IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 16TH OCTOBER 2007 / 24TH ASWINA 1929

WA.No. 653 of 2004(A)

(AGAINST THE JUDGEMENT IN WPC.1095/2004 Dated 03/02/2004)

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APPELLANT: PETITIONER:

E.J.DAVIS,
EDASSERY HOUSE,
ANGADIKADAVU ROAD, ANGAMALLY,
ERNAKULAM DISTRICT.

BY ADV. SRI.GEORGE POONTHOTTAM

RESPONDENTS: RESPONDENTS:

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1. STATE OF KERALA,
   REPRESENTED BY THE SECRETARY TO GOVERNMENT,
   TAXES (A) DEPARTMENT, GOVERNMENT SECRETARIAT,
   THIRUVANANTHAPURAM.

2. THE COMMISSIONER OF EXCISE,
   COMMISSIONERATE OF EXCISE,
   THIRUVANANTHAPURAM.

3. THE DISTRICT COLLECTOR,
   ERNAKULAM.

4. THE ASSISTANT EXCISE COMMISSIONER,
   ERNAKULAM.

5. RAJENDRAN,
   S/O. KRISHNAN,
   CHILLIKKATTIL HOUSE, RAJAKUMARI KARA,
   RAJAKUMARI VILLAGE, UDUMPANCHOLA TALUK,
   IDUKKI DISTRICT.

6. WILSON,
   S/O. KURIAN, KUTHINAPPILLY HOUSE,
   KATHRIKADAVU KARA, ELAMKULAM VILLAGE,
   KANAYANNUR TALUK,
   ERNAKULAM DISTRICT.

7. THE EXCISE CIRCLE INSPECTOR,
ALUVA.

R1-4 & R7 BY GOVERNMENT PLEADER SRI.M.P.SREEKRISHNAN
ADV.SRI.K.C.ELDHO
ADV.SRI.K.DIVAKARAN NAIR

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 16/10/2007, ALONG WITH WPC NO. 39162 OF 2003 OP NO. 9789 OF 2003 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN, J.

W.A.No.653 of 2004-A, W.P.(C) No.39162 of 2003-K &
O.P.No.9789 of 2003-M

Dated this the 16th day of October, 2007.

J U D G M E N T

Sankaran, J.

W.A.No.653 of 2004 arises out W.P.(C) No.1095 of 2004. That writ petition was filed by E.J.Davis challenging Exts.P3 and P4 notices issued by the Circle Inspector of Excise, Aluva directing the petitioner to deposit a sum of Rs.19,05,385 and Rs.12,92,997/-. The learned Single Judge dismissed the writ petition.

(2). W.P.(C) No.39162 of 2003 is filed by one Philomina challenging Exts.P1 and P2 notices dated 31-10-2003 issued by the Circle Inspector of Excise, Aluva directing her to pay the amounts as shown in Exts.P3 and P4 marked in W.P.(C) No.1095 of 2004 which is the subject matter in W.A.No.653 of 2004.

(3). O.P.No.9789 of 2003 is filed by E.J.Davis and C.P.Maggi challenging Ext.P9 requisition for recovery of an amount of Rs.30,00,440/- and Ext.P10 letter dated 25-2-2003 issued by the Assistant Excise Commissioner, Ernakulam directing the Collector to collect the sum of Rs.30,54,083/- from the petitioners.

(4). In respect of Arrack Shops in Group II/93-94 of Angamali Range, the auction purchasers, namely, Davis and Philomina transferred the licence in favour of one Rajendran which was approved by the order dated

31-12-1993 issued by the Assistant Excise Commissioner, Ernakulam. In the said order it is recorded that the licensees, namely, Davis and Philomina had cleared the entire kist arrears and also the dues payable to the Abkari Welfare Fund. The order would indicate that no amount was payable by the original licensees. It is also recorded in the order that the transferee of the licence had offered a surety for the due performance of his liabilities. One Mr.P.C.Joseph was the surety and he had also produced solvency certificate. In the said proceedings, it is held thus:

> *" In the circumstances the privilege of arrack shops in Group No.II/93-94 of Ankamaly Range is transferred from the Joint names of the first two applicants to the name of the third applicant, Sri.Rajendran, S/o Krishnan, Chillikkattil House, Rajakumari kara and village, Udumbanchola Taluk, Idukki District along with the 30% security deposited by the original purchasers, on the responsibility of the Excise Inspector, Ankamaly for prompt collection of future dues. The solvency produced by the original purchasers will not be released till all the dues in respect of the group are realised."*

(5). In respect of Arrack Shops in Group No.III/93-94 of Angamali Range, Davis and Philomina transferred the licence in favour of one Mr.Wilson and it was approved by Ext.P2 order dated 31-12-93 passed by the Assistant Excise Commissioner, Ernakulam. Ext.P2 would also indicate that there was no arrears on the part of the transferors and that the transferee had furnished sufficient security for the due performance of his obligations under the Act and

Rules. Similar provision for retention of solvency was made in Ext.P2 as well.

(6). It would appear that the transferees of the licences committed default in payment of excise duty. It would also appear that the amount could not be realised from the transferees. One of the transferees (Rajendran) had applied to declare him as insolvent and the Court had passed an order declaring him as insolvent. Since the authorities could not recover the amount from the transferees, Exts.P3 and P4 notices dated 31-10-2003 were issued to the transferors by the Circle Inspector of Excise, Aluva directing them to pay the arrears payable by the transferees. These notices were challenged in W.P.(C) No.1095 of 2004 from which W.A.No.653 of 2004 arose. Similar notices are under challenge in W.P.(C) No.39162 of 2003 filed by Philomina.

(7). Petitioners in O.P.No.9789 of 2003 had transferred licenses issued in their favour to third parties and Exts.P1 and P5 orders dated 30-11-1993 were issued by the Assistant Excise Commissioner, Ernakulam approving the transfer. In those orders also it is mentioned that the transferors had no subsisting liability and the transferees have furnished sufficient security for their performance of obligations. In respect of these transferees-licensees as well arrears were there and the arrears are sought to be recovered by recourse to revenue recovery proceedings against the petitioners in O.P.No.9789 of 2003 (transferors) and they challenge the same in the writ petition. It is also stated

that during the pendency of the writ petition, they were compelled to pay the amounts as evidenced by Exts.P16 to P19 in O.P.No.9789 of 2003.

(8). The learned Single Judge held in W.P.(C) No.1095 of 2004 that in Exts.P1 and P2 orders approving transfer of licences it was mentioned that the solvency produced by the original purchasers will not be released till all the dues in respect of the Group are realised. It was held that there is nothing which prohibits the Assistant Excise Commissioner in imposing any condition while granting the transfer. It was also held that the transfer is based on a contract between the transferor and transferee and the security furnished by the petitioner for the group of shops as a whole was retained as additional security for the liability of the abkari dues of the transferred shops. Learned Single Judge took the view that the condition in the orders passed by the Assistant Excise Commissioner that the solvency shall be retained would enable the respondents to proceed against the petitioner for realisation of the amount due from the transferees of the petitioner.

(9). Learned counsel for the appellant and writ petitioners submit that the transferors having transferred the licence with the permission of the Assistant Commissioner of Excise and they being not in arrears of either the kist or welfare fund or excise duty, the transferors could not be proceeded against for realisation of any arrears due from the transferees. Learned Senior Government

Pleader on the other hand relies on Rule 5 (16) of the Abkari Shops (Disposal in Auction) Rules to contend for the position that the solvency could be invoked and the amount could be realised from the petitioners. Rule 5 (16) of the Abkari Shops (Disposal in Auction) Rules reads as follows:

> *" A resale or disposal of the shop effected under sub-rules (10) & (15) shall always be at the risk of the original auction purchaser, who cannot lay claim to any gain accruing from the resale but in the event of loss to Government he shall be required to make good the deficiency between the total amount payable for the whole period under terms of the original sale and the total amount payable by the resale purchaser. The liability against the original auction purchaser and the resale purchaser shall be calculated respectively upto and from the date of confirmation of the resale. In the event of loss to Government the forfeited deposit shall be deducted from the loss arising from the resale and the reminder, if any, with interest at 18 percent or such other rate of interest as may be fixed by the Government from time to time thereon shall be recovered from the defaulter in the same manner as if it were an arrear of land revenue. If the forfeited deposit is greater than the loss by resale the whole of such deposit shall be credited to the Government. When the rental fetched at a resale is higher than the original rental, the amount of liability against the original auction purchaser shall be calculated at the rate of the original rental upto the date of confirmation of the resale. A defaulting auction purchaser or resale purchaser shall be similarly liable, if the privilege is disposed of subsequently and such disposal results in loss to the Government as compared with the original sale. Disposal otherwise than by resale includes closure or departmental management. The departmental management fee collected from a shop while it was under departmental management*

due to default of payment of security, kist, etc., shall be liable to forfeiture at the discretion of the Excise Commissioner."

(10). Rule 5 (16) contemplates a situation where a resale or disposal of a shop becomes necessary and the sub-rule provides that it would always be at the risk of the original auction purchaser. The contingency as contemplated in sub- rule 16 is not available in the present case. There was no re-auction nor was there any default on the part of the original licensees. There was a transfer from the original licensees to third parties which was approved by the Assistant Commissioner of Excise as per Rule 6 (22) of the Abkari Shops (Disposal in Auction) Rules. Rule 6 (22) provides that licensee shall not sell or otherwise transfer his contract or licence without the written consent of the Assistant Excise Commissioner concerned. The Assistant Excise Commissioner having granted the written consent there can be no liability on the transferors for any dues from the transferee after the transfer is effected, unless of course there is a contract to the contrary or a statutory provision making the transferor liable for the liability of the transferee as well. The learned Government Pleader was not in a position to point out any such contract to the contrary or any such statutory provision which would enable the authority to proceed against the transferor for the dues from the transferee.

(11). The contention that the order to retain the solvency certificate would enable the respondents to realise the dues from the transferors, is without substance. Rule 5 (10) of the Abkari Shops (Disposal in Auction) Rules would indicate that the solvency certificate is required for 30% of the bid amount. Sub-rule 10 of Rule 5 provides that the person declared to be auction purchaser shall make a deposit in cash or Bank draft or both at the time of signing the agreement and sale list of an amount equivalent to not less than 30% of the amount of his bid or such other higher amount as may be fixed by the officer conducting the sale and shall also furnish personal sureties if so required by such officer. He shall also produce before the auctioning officer a solvency certificate for an amount not less than 30% of the bid amount or in lieu of solvency certificate additional cash security or Bank draft or Bank guarantee for an amount not less than 30% of the bid amount. In the case on hand, while effecting transfer, 30% security has also been transferred to the benefit of the transferee and therefore, in our opinion, the solvency certificate loses its significance and operation, when such transfer of security is effected to the benefit of transferee. The contention put forward by the respondents that the transferors continue to be liable for the dues from the transferee is therefore unsustainable.

(12). For the afore-said reasons, we are unable to agree with

the view taken by the learned Single Judge. W.A.No.653 of 2004 is allowed and Exts.P3 and P4 are quashed. W.P.(C) No.39162 of 2003 is also allowed and Exts.P1 and P2 are quashed. O.P.No.9789 of 2003 is also allowed and Exts.P9 and P10 are quashed. Any amount paid by the petitioners in O.P.9789 of 2003 pursuant to the revenue recovery proceedings, as evidenced by Exts.P16 to P19 shall be refunded to the petitioners therein. It is submitted by the appellant in W.A.No.653 of 2004 and the petitioner in W.P.(C) No. 39162 of 2003 that the petitioners in those writ petitions have also paid amounts due, pending the proceedings. If any such payment is made, the petitioners therein would also be entitled to get refund of the same.

(13). In view of the orders passed in the writ appeal and writ petitions, all pending interim applications are closed.

Ordered accordingly.

(H.L.DATTU)
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

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